

CHAPTER THREE

AUTHORITY AND DELEGATION

Terminal Learning Objective: Given various factual situations, determine the authority of the contracting officer, how that authority can be delegated, and the impact of that delegation.



Enabling Learning Objective 1: *Limitations on Contracting Officers' Authority*

Given various choices, indicate those situations in which contracting officers do not possess authority, either by virtue of the limitations imposed on their express authority, or by judicially recognized limitations on the inherent authority of their position.



Enabling Learning Objective 2: *Other Means of Acquiring Authority*

Given a factual situation, apply the concept of equitable estoppel to illustrate whether the government may be liable for the otherwise unauthorized acts of its officers, employees and agents.



Enabling Learning Objective 3: *Ratification*

Given examples, identify circumstances under which actions of an unauthorized government agent may lawfully be ratified.



Enabling Learning Objective 4: *Delegating Authority to Others in Different Contexts*

Identify the means by which a contracting officer receives authority and how that may be delegated, and identify the impact of such delegation; identify the tools available to a contracting officer to control such delegation.



Enabling Learning Objective 5: *Impact of Electronic Transmissions*

Provided various factual situations, apply contract formation concepts to electronic contracting acquisitions to determine the point at which a contract comes into existence.

Introduction. This Chapter explores the sources of authority employed by contracting personnel to transact business on behalf of the United States government. The Chapter initially looks at the authority given by the Constitution to the Federal government to form contracts. The chapter then reviews how this authority is delegated to the government officers and employees who directly transact business on behalf of the United States. Although these delegations are usually formal (i.e. – A Contracting Officer’s warrant) we shall see that informal delegations also occur.

This Chapter will be discussed on the first day of class. Consequently, students must read these materials prior to coming to the resident portion of the class.

I. AUTHORITY AND POWER OF THE UNITED STATES TO CONTRACT

A. INHERENT POWER TO CONTRACT

Among the powers delegated to the United States is the authority to enter into contracts. Though some of the specific contract duties are authorized in the Constitution, other duties are implied in governmental theory. The United States Government has the right to contract as an essential element of its sovereign powers. This right is not expressed in so many words, but is implied from the theory that a government is charged with the performance of public duties, and that to fulfill these obligations, contract formation is not only proper, but necessary. The Federal Government is one of delegated powers, and this right to contract is limited in scope to the authority delegated to the Government. Therefore, in order to ascertain whether a particular contract entered into by the Government is valid, it is necessary to examine the subject matter of the contract in light of constitutional authority. Both the executive and legislative branches of our Government are delegated specific duties under the Constitution, as described in Chapter 1. In carrying into effect the majority of these duties it is necessary for a branch of the Government to enter into contracts with non-government parties. For example, Article I designates the power that is vested in Congress, and Section 8 of that Article lists a number of important powers which require contract formation such as "To raise and support Armies . . ." "To provide and maintain a Navy," and "To borrow Money on the credit of the United States."

One of the most important clauses in the Constitution (Section 8, Clause 18) authorizes the Congress "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This is called the "necessary and proper clause." Together with the President's constitutional duty to "take care that the Laws be faithfully executed" (Article II, Section 3), it supplies the constitutional power for the Government to enter into contracts, or engage in other acts which discharge responsibilities delegated to it by express provisions of the Constitution.

II. THE CONCEPT OF AUTHORITY

The role of the Contracting Officer or agent is important in forming contracts. Since the agent exercises certain powers, those actions are crucial to the legal relations between the principal and the third party.

A. PRINCIPAL-AGENT RELATIONSHIP

Agency is defined as the relationship of a person (called the agent) who acts on behalf of another person, company, or government, known as the principal. "Agency" may arise when an employer (principal) asks its employee (agent) to do something on the principal's behalf (i.e. sign a contract with a 3rd party on behalf of the principal.) The

basic rule is that the principal becomes responsible for the acts of the agent, and the agent's acts are, legally speaking, those of the principal. (In Latin, this concept is known as *respondeat superior*). In many cases it is not only permissible for an agent to act for a principal, but necessary. This is particularly true when the principal is not an actual person, but a legal entity such as a corporation or a governmental entity. The U.S. Government can act only through agents. Obviously, the “United States of America” cannot sign a contract; only a person acting on behalf of the USA can do that. Thus, an agency relationship arises when a principal authorizes an agent to act as his or her representative with respect to another person (a “third party”) and the agent consents to so act.

1. Authority Of The Agent

The link that binds third parties to the principal is the concept of authority. “Authority is the power of the agent to affect the legal relationships of the principal by acts done in accordance with the principal's manifestations of consent to him.” (*Restatement of Agency, Section 5*). This authority depends on the type of agency that is created by the principal and agent. Agencies are usually classified as either real or actual, where an express or implied delegation of authority exists; or apparent, where a principal is bound by the agent’s mere “appearance” of authority from the principal.

2. Express Authority

Express agency or authority is created by explicit language either in writing or orally. Agency created by spoken words is generally as binding as agency created by a writing, but may be difficult to prove. Where authority is given in writing, the writing itself ordinarily supplies the element of proof necessary where a dispute arises concerning the agency relationship. In those cases where the writing is ambiguous, “parol” or oral evidence may be used to prove the existence and limits of the authority, subject to the rule that oral evidence may not be used to contradict the plain and clear meaning of a writing.

3. Apparent Authority

The legal doctrine of apparent authority is employed when a person appears to have been given authority by the principal, even though the principal has not granted any real or actual authority. In order to invoke this doctrine, it must be shown that the principal is responsible for creating the appearance of authority. For example, consider a situation in which a company that rents apartments hires someone to live in and oversee operations within the building, as well as take applications of new would-be tenants which are to be forwarded to the company for approval or disapproval. If this employee signs a lease with an applicant, the principal might be bound to honor the lease under the doctrine of apparent authority, if the applicant reasonably believed that the company’s on-site employee had authority to bind the company. The purpose in finding such authority is to prevent unjust injury of a third party who relies on the appearance, created by the principal.

Certain elements must be found before apparent authority becomes effective to bind the principal. First, the appearance of authority must be created by the principal's actions and not by the agent's own action (i.e., a principal will not be bound by an administrative assistant who holds himself or herself out as an Executive of the company, and then signs deals on behalf of the company.) Second, it must have been reasonable for the third party to rely on the appearance of authority. Third, the reliance must result in some detriment (injury) to the third party.

There are numerous situations wherein agency by apparent authority can be found. For example, a store owner asks a friend to "mind the store but don't sell anything or take any orders". A customer then buys an article, reasonably believing that the friend was in fact a sales clerk. Here, the friend will be deemed to have authority to make the sale under the theory of apparent authority. Other cases arise where there is an actual agency relationship between the principal and the agent, but the agent is given less authority than is usually vested in agents in similar positions. Where a third party justifiably relies to their detriment on the usual authority of such persons in similar positions, and the agent exceeds their actual authority, the principal will be bound as a result of the doctrine of apparent authority. The existence of apparent authority is determined on the basis of the particular facts in each case.

Remember however, in Federal Government contracting the Government is not bound by "apparent authority."

B. ACQUISITION OF AUTHORITY BY CONTRACTING OFFICERS

Contracting Officer authority derives mainly from a delegation of authority, in writing, from the Head of Contracting Activity, the so-called "contracting warrant." FAR 1.602-1 states that this includes "authority to enter into, administer, or terminate contracts and make related determinations and findings." The FAR cautions that "Contracting officers may bind the Government only to the extent of the authority delegated to them." The FAR also cautions that no contract may be awarded "unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met." FAR 1-602-1(b).

When contracting officers exceed the limits of their authority as agents of the government, the principal is not bound. For example, in *Atlantic, Gulf & Pacific Co. of Manila, Inc.*, ASBCA 13533, 72-1 BCA ¶ 9415, a termination settlement was not binding on the contractor because it exceeded the TCO's authority. In other cases, modifications have not been binding because an ACO lacked authority, *Strick Corp.* ASBCA 15921, 73-2 BCA ¶ 10,077. In such cases, the key issue is the authority delegated to the agent. Thus, a contracting officer's failure to follow prescribed internal agency procedures for gaining approval of a proposed agreement will not invalidate the

executed agreement, so long as the Contracting Officer actually had authority to bind the government. See *Texas Instruments, Inc. v. United States*, 922 F.2d 810 (Fed. Cir. 1990). For example, a contract award signed by a contracting officer with the proper warrant would bind the government, even if that person failed to submit the proposed award to a Contract Review Board for approval.

C. ACQUIRING AUTHORITY BY MEANS OTHER THAN AN EXPRESS DELEGATION

The vast majority of government personnel who interact with contractors do not possess contracting warrants. They are usually “representatives” of the contracting officer who have been appointed to monitor contractor performance, inspect contractor work or perform other tasks in support of the contract. The actions of these individuals may, in fact, bind the government, based on one of three common legal theories: implied authority, ratification and imputation of knowledge.

1. Implied Authority

A government official who has implied actual authority can bind the government. See *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed.Cir.1989). The Federal Circuit in *Landau* held that the actual authority of a government official is implied when such authority is "considered to be an integral part of the duties assigned" to that official. *Id.* (quoting John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 43 (1982)).

Actual authority may be implied when an agent is expressly authorized to complete a task, but is not directed how to accomplish the task. The authority to carry out the task will “impliedly” include authority to take actions that are "usual, customary and necessary" to accomplishment of the goal. Sometimes, this issue will hinge on whether authority to bind the Government is an integral part of the duties assigned to the agent, *Appeal of News Printing Company, Inc.*, GPOBCA No. 13-94 (1998). Thus in *DOT Sys., Inc*, DOTCAB 1208, 82-2 BCA ¶15,817, the Board concluded that “in view of the specific duties assigned to the COTR..., we find the COTR was clothed with the requisite implied authority to bind the government to a constructive change under the terms of the contract.” Similarly, delegations of authority to inspectors to accept or reject work have been found to include implied authority to make minor adjustments to the work. Some courts have found that, if an inspector has authority to determine compliance with contract requirements and the inspector misreads the specifications and thereby changes the contract, the government may be bound by the constructive change. *WRB Corp v. United States*, 183 Ct. Cl. 409 (1968).

But the implied authority doctrine is not without its limits. In order to apply this doctrine, the court must find some government official who had authority to take the action in question, and then find a way in which that authority has been “implied” in some delegation to a subordinate. In the case of *Perri v. U.S.*, 53 Fed.Cl. 381 (2002). , FBI field agents did not have implied actual contracting authority to enter into compensation agreement with confidential informant/cooperating witness promising the individual a percentage of the sales proceeds of farm or other property forfeited as a

result of the FBI sting operation. The Court of Appeals found that contracting authority to enter into such a compensation agreement was not integral to the duties of the agents in developing and controlling plaintiff as a confidential informant and cooperative witness because reasonable alternative means were available to the agents to obtain his cooperation. In *Dolmatch Group, Ltd. v. U.S.*, 40 Fed.Cl. 431 (1998), the Government agent's job description included "initiating proposals" and "negotiating the terms" of contracts. The court held that because these duties could actually be performed without contractually binding the Government, the agent lacked contracting authority.

2. Imputation Of Knowledge

When an agent is appointed by a principal, the agent becomes the "eyes and ears" of the principal. Information and knowledge acquired by the agent may be imputed to the principal. The rationale for imputing the agent's knowledge to the principal is that as to third parties, the agent is the legal "alter-ego" of the principal.

In applying this rule to the government, the courts will consider whether the nature of the relationship between the Contracting Officer and the representative is such that it creates the presumption that the principal (Contracting Officer) would be informed. For example, in *U.S. Federal Eng & Mfg., Inc.*, ASBCA 19909, 75-5 BCA ¶ 11,578, the Board held:

The fact that the contracting officer did not have actual knowledge of the additions to be made to the device does not insulate the Government from the consequences that actual knowledge would impose. His various representatives are his eyes and ears (if not his voice) and their knowledge is treated for all intents and purposes as his.

There are several exceptions to this rule that relieves the principal of liability for knowledge not communicated by his agent. First, where the agent acquires knowledge from a source that requires that the agent keep it confidential, such knowledge will not be imputed to the principal. Secondly, where the agent and the third party collude to cheat or injure the principal, the knowledge of the agent will not be imputed to the principal. Thirdly, where the agent acquired knowledge in some capacity other than as the principal's agent, such knowledge will not be imputed to the principal.

3. Ratification

Ratification is the adoption of an unauthorized act, resulting in the act being given effect as if it had been originally authorized. *Restatement, Second, Agency* § 82. The rules applicable to ratification in connection with Government contracts are essentially the same as for private contracts. An agreement made by a Government employee, which is not binding because of a lack of authority, may become binding upon ratification by a government official with proper authority. Ratifications may be formal (i.e., ratifications of unauthorized commitments under FAR 1.602-3) or informal (such as

where a Contracting Officer, through words or deeds or even inaction, “adopts” the unauthorized agreement as his or her own. As the Claims Court declared in *Moran Bros. Co. v. United States*, 39 Ct. Cl. 486 (1904), “[I]f upon full knowledge of the facts, the superior officer ratifies and confirms the action of his subordinate, is not that in law equivalent to an express authority in the subordinate that the time he ordered the performance of the labor?”

Ratification may be especially important in connection with Government contracts because of the fact that the Government is bound only by the actions of its agents who have actual authority. In order to impose this doctrine, it must be established that (1) the ratifying official has authority to ratify the agreement; (2) that the ratifying official had power to authorize the work being ratified; (3) that the ratifying official has knowledge, either actual or constructive, of the facts that led to the unauthorized action; and (4) that the ratifying official has adopted the unauthorized conduct, either expressly, through conduct, or by silence. *Administration of Government Contracts, Third Ed.* (R. Nash & J. Cibinic, 1995)

It is noteworthy that the Court of Federal Claims has recognized that, on some occasions, the *institution as a whole* might ratify a contract. In *Digicon Corp. v. United States*, Fed. Cl., No. 02-604C, 4/22/03, the Air Force demonstrated its acceptance of the task order at issue by executing an express written agreement, by explicitly and repeatedly recognizing the existence of that task order, and by benefiting from the products and services provided by Digicon under the contract for 16 months. The Air Force further showed its intent to treat the contract as a binding commitment by making more than \$16 million in payments and attempting to exit the agreement under the terms of the contract. Finally, a contracting officer with unlimited contracting authority was directly involved in the implementation and oversight of the contract.

D. RAMIFICATIONS OF THE PRINCIPAL-AGENT RELATIONSHIP

1. Fiduciary Relationship

It is generally stated that there exists between the principal and agent a fiduciary relationship that requires the utmost good faith and loyalty on the part of the agent in the performance of his or her duties for the principal. The agent must act solely for the principal and must not work against the principal's best interests in the agent's own personal capacity.

2. Liability Of Agent

An agent is liable to his principal for the wrongful use of the principal's property that is in the agent's charge. If the agency relationship is known to the third party, the agent is not liable in their personal capacity for any of the contracts that the agent enters in behalf of the principal, unless the agent exceeds the authority and the principal does not ratify the unauthorized acts. In such a case, the agent could be held personally liable.

III. GOVERNMENT AUTHORITY

Authority has been delegated to branches of the Government by the express or implied terms of the Federal Constitution; redelegation is often necessary to carry into effect the assigned duties and granted powers. The Federal Acquisition Regulation, (FAR) is a regulatory codification of redelegated authority, intended to implement the responsibilities assigned to the branches of Government by the Federal Constitution. The FAR is issued in accordance with the Office of Federal Procurement Policy Act, 41 U.S.C § 401 *et seq.* It establishes a Government-wide procurement system, subject to discretion accorded by statute to specific Departments or agencies. The FAR unifies the implementation of the exercise of the authority by subordinate officers and agents, and specifies the duties, responsibilities and express authority of agents contracting for the benefit of the Government. Therefore, the Constitution, statutes, and executive department regulations provide a framework within which the concept of authority is applied.

Is the Air Force contractually bound by the promise of a Deputy Assistant Secretary of the Air Force to pay more than its share of the cost of an environmental cleanup? See *TOWN OF FLOYD v. U.S.* at Vol. 2.

DELEGATING AUTHORITY

FAR Part 42 provides detailed guidance as to how to assign (delegate) interagency contract administration responsibilities and delegating contract administration authority from the contracting office making award to the contract administration office (CAO). It also specifies the extent of CAO authority and how certain contracting authority may be withheld from the CAO (or expanded). There is, however, little regulatory guidance concerning how day-to-day contracting officer authority may be delegated. Judicial and administrative decisions recognize that authority may be delegated not only in writing, but also orally and by implication, *i.e.*, the conduct of Government officials in authority amounts to an assignment of certain authority. Authority issues frequently concern whether the CO has impliedly delegated authority, not whether the authority in question is express or implied.

IV. CONTINGENCY CONTRACTING

Contracting officers have the authority to engage in contingency contracting when requirements cannot be satisfied by the normal acquisition process. When an emergency arises which requires an urgent acquisition, the contracting officer should first look for any existing contracts, purchase orders, blanket purchase agreements, and delivery/task orders to satisfy the requirement. If none of those are available, noncompetitive contracts can be let under “unusual and compelling circumstances.” Lack of planning, personnel turnover, or expiring funds are not valid justifications. Procurement through negotiation offers the fastest method of obtaining goods and services, and can be accomplished by an oral solicitation and request for an oral offer. If an oral solicitation is inappropriate, an agency could issue a letter request for proposal (FAR 6.302). While an agency must solicit offers from as many potential sources as is “practicable under the circumstances,” only one offeror should be sought if there is no reasonable likelihood of receiving other offers that meet the Government’s needs. If one firm is solicited, the only evaluation required is that the goods or services meets the agency needs. Price may be definitized later.

The head of the contracting activity or designee has the flexibility to allow an award of a letter contract when there is not enough time to make a definitized award (FAR 16.603). The only clauses required to be included in the letter contract concern the price definitization schedule (FAR 52.216-24) and limitation of Government liability (FAR 52.216-25). While there is no firm rule dictating how long a contingency contract may run, periods of performance as long as nine months have been found justified, yet in another case four months was considered excessive. Even without precise guidelines and a step-by step procedure outlined by FAR or statute, existing acquisition rules have enough built-in flexibility to allow contracting officers to quickly respond to emergencies without waivers or deviations from required procedures.

V. ELECTRONIC TRANSMISSIONS



Enabling Learning Objective 5: *Impact of Electronic Transmissions*

Provided various factual situations, apply contract formation concepts to electronic contracting acquisitions to determine the point at which a contract comes into existence.

It is not uncommon for the currency of the law to lag behind changes in society. Such has been the case with law and the internet, which continues to reshape commerce and society in ways we are still discovering. Most U.S. commercial law developed at a time when the telegraph would have been considered expeditious.

With the advent of the internet, not only has the speed of communication increased, but also the scope and volume of what is being communicated. Individuals can “swap” huge amounts of data that, in some cases, is proprietary. For the movie and recording industries, this has created a practical problem over how to protect various types of intellectual property.

Another problem area involves electronic contracting. For years, the question of whether an electronic communication constituted a “writing” for purposes of the Statute of Frauds was left unanswered. Was an electronic “signature” sufficient to constitute *binding* assent to electronically transmitted contract terms. Many of these issues were resolved by the Electronic Signatures Act signed into law by President Bill Clinton in 2000. That statute, 15 U.S.C. §§ 7001 *et. seq.*, provides that “with respect to any transaction in or affecting interstate or foreign commerce -

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation

Although the statute excludes a number of transactions from the Act (i.e. wills, trusts, codicils, testamentary trusts, family law), in the main, most commercial transaction (including sales under Article 2 of the U.C.C.) are subject to this law. It is important to note that although there remains a statutory requirement that any obligation of Government funds be supported by “documentary evidence of a binding agreement that is ... in writing in a way and form, and for a purpose authorized by law” (31 U.S.C. § 1501), GAO has long held that an electronically recorded agreement may satisfy this requirement. See Matter of: National Institute of Standards and Technology-Use of Electronic Data Interchange Technology to Create Valid Obligations, 71 Comp. Gen. 109, B- 245,714, 96-2 CPD ¶ 225 (Dec 13, 1991). More recently, the FAR has added provisions on electronic commerce (FAR 4.5) and has redefined “signature” to include electronic signatures (FAR 2.101).

VI. Review

Prior to coming to the resident portion of the class, students should have a basic understanding of the following terms:

PRINCIPAL-AGENT RELATIONSHIP

Actual Authority

Implied Authority

Apparent Authority

Imputed Knowledge

Ratification